

SINGAPORE REPORTS

Teo Soh Lung v The Minister For Home Affairs And Ors

HIGH COURT (SINGAPORE) – ORIGINATING MOTION NO
188 OF 1988
CHUA J
25 APRIL 1989

Constitutional Law – Preventive detention – Whether detention justiciable on Anisminic principles – Whether statutory amendments had amounted to legislature disposing of judicial matter – Whether doctrine of separation of powers violated – Whether basic features and implied limitation on constitutional amendments doctrine applicable in Singapore – Whether recent amendments had violated the doctrine – Internal Security Act (Cap 143, 1985 Ed), ss 8(1), 8A, 8B, 8C, 8D & 10 – Constitution of the Republic of Singapore, arts 4, 5(1), (2), 9, 11(1), 12(1), (2), 13, 14, 21, 58(1), 93 & 149 – Constitution of Malaysia, arts 5(4), 8, 121 & 159 – Rules of the Supreme Court 1970, O 54 – Constitution of the Republic of Singapore (Amendment) Act (No 1 of 1989), s 3 – Internal Security (Amendment) Act (No 2 of 1989) – Act A354 of 1976 [Mal] – Restricted Residence Enactment [Mal] – Emergency (Essential Powers) Act 1979 [Mal], ss 2(4), 9(3) & 12

Administrative Law – Writ of habeas corpus – Detention for national security reasons – Whether reasons for detention justiciable – Whether allegations of bad faith by detaining authority justiciable – Internal Security Act (Cap 143, 1985 Ed) ss 8(1), 8A, 8B, 8C, 8D & 10

The applicant was arrested by officers from the Internal Security Department ('ISD') on 21 May 1987 and detained under a detention order valid for one year with effect from 20 June 1987. This order was made under s 8(1) of the Internal Security Act ('ISA'). On 26 September 1987, the detention order against the applicant was suspended subject to the execution of a bond and compliance with certain conditions. On 19 April 1988 the Minister, in exercise of his powers under s 10 of the ISA, revoked the suspension and the applicant was again detained. The applicant then applied for a writ of habeas corpus, which application was heard and dismissed by the High Court. The applicant's appeal to the Court of Appeal (Civil Appeal No 81 of 1988) was allowed on the ground that there was not sufficient evidence of the President's satisfaction as required under s 8(1) of the ISA. The applicant was released but re-arrested almost immediately under a new detention order.

Parliament later made certain amendments to the Constitution of the Republic of Singapore ('the Constitution') (including art 149) and to the ISA. The applicant again applied to the High Court for a writ of habeas corpus. She argued that nothing in art 149 of the Constitution as amended prevents the court from reviewing the legality, rationality and constitutionality of the new or prior detention orders. It was also argued that her detention was made for improper purposes and in a manner which was illegal, irrational and unconstitutional and beyond the scope of the powers conferred by the ISA and hence null and void. It was claimed that *Anisminic Ltd v Foreign Compensation Commission*³ enunciated the correct principles to be applied. Section 8(1) of the ISA it was argued, had no application to a decision made or act done otherwise than in pursuance of the power conferred by the ISA. The court was accordingly not prevented from applying legal principles enunciated by the Court of Appeal in its judgment of 8 December 1988 (the previous case in which the applicant's application for a writ of habeas corpus was successful). The applicant also raised the

- A argument that the purported amendments to art 149 of the Constitution are contrary to the supreme law of the Constitution and are not valid amendments. Alternatively, the amendments to s 8 of the ISA do not come within the legislative powers conferred by art 149 as amended since the article should be given a strict interpretation. The amendments were therefore void. Further arguments made were that as the amendments were passed to deprive the applicant of the fruits of her victory in the previous case, to authorize her illegal detention and to retrospectively deny her the right to appeal to the Privy Council, the amendments denied her the right to equal protection of the law and were accordingly void under art 12. The amendments were alleged to violate the separation of powers between the various branches of government, by usurping the power of the independent judiciary for the impartial determination on the question as to whether the executive's decision to detain the applicant was in fact based on national security considerations. The amendments were a direct disposal of the applicant's proceedings by the legislature itself, and are therefore judicial acts and not 'law' within art 5(1). Parliament was also limited in its power to amend the Constitution and had overstepped the limits by amending the basic structure of the Constitution.

Held, dismissing the appeal:

- (1) The purpose of s 8B(1) of the ISA is to affirm the law as laid down in *Lee Mau Seng v Minister of Home Affairs, Singapore & Anor*,² the decision having been given on 13 July 1971. The High Court there decided that the sufficiency and relevancy of the consideration upon which the executive detained the applicant under s 8(1) of the ISA were matters for the subjective satisfaction of the President acting in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet ('the subjective test'). The court also held that 'mala fides' or bad faith is not a justiciable issue in the context of the ISA.
- (2) Section 8B(1) of the ISA clearly laid down that the subjective test applies to the exercise of powers pursuant to ss 8 and 10 of the ISA and s 8B(2) provides that there is to be judicial review only in regard to any question relating to compliance with any procedural requirement of the ISA governing such act or decision. The respondents accordingly cannot be required to produce any other evidence apart from the grounds and allegations of fact to prove to the court that their decision was in fact based on national security considerations.
- (3) The burden of proof is on the applicant to prove that her detention is unlawful as the respondents have produced a valid detention order and evidence of the subjective satisfaction of the President acting on the advice of the Cabinet.
- (4) The applicant's challenge on the grounds of mala fides or improper purpose cannot be raised in the present proceedings. This was in accordance with case-law authority.
- (5) In the *Anisminic* case,³ the court recognized that whether any nullity or lack of jurisdiction had arisen depended on the interpretatory power conferred upon the tribunal. The question therefore was whether the tribunal in making its decision had stayed within the mandate given to it by Parliament.
- (6) The scheme under the ISA was that Parliament has left to the Cabinet and the President acting in accordance with the advice of the Cabinet to determine whether it is necessary in the interests of national security to detain a person. Parliament has not sought in the ISA to define activities which are prejudicial to national security. It is for the executive to determine as a matter of policy and judgment whether certain activities are prejudicial to national security. In this case the executive had acted upon its jurisdiction conferred by Parliament.

(7) To allow the court to investigate into the good faith or otherwise of the President who was to act in accordance with the advice of the Cabinet in arriving at his satisfaction would be inconsistent with the scheme intended by Parliament. The amendments did therefore deprive the applicant of the right to effective judicial review of the legality, rationality and constitutionality of her detention.

(8) If the framers of the Singapore Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations but art 5 has no such limitation.

(9) If the courts have the power to impose limitations on the legislature's power of constitutional amendments, they would be usurping Parliament's legislative function contrary to art 58 of the Constitution.

(10) The *Kesavananda*¹⁰ doctrine (that there were basic features of the Constitution that Parliament could not amend) is not applicable to the local Constitution. Considering the differences in the making of the Indian and the local Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend their Constitution.

(11) In any case, none of the amendments complained of has destroyed the basic structure of the Constitution.

(12) A reaffirmation of the principles laid down by the courts cannot be said to be objectionable as usurping judicial power or being contrary to the rule of law. There is no abrogation of judicial power.

(13) It is erroneous to contend that the rule of law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgment on applications for judicial review or other actions. Parliament has done no more than enact the rule of law relating to the law applicable to judicial review. The legislation does not direct the court to enter a particular judgment or dismiss a particular case.

(14) The question whether a particular provision in any law enacted pursuant to art 149 is designed to deal with a particular situation is non-justiciable. Preventive detention relates to national security which is the responsibility of the executive.

(15) Although art 11(1) of the Constitution protects a person against retrospective criminal laws and repeated trials, the ISA is not a criminal law and the question of repeated trials does not arise in the present case. Preventive detention is clearly not a penal or criminal matter.

(16) The amended art 149(1) renders the Internal Security (Amendment) Act 1989 valid notwithstanding that it is inconsistent with art 12. The new ISA provisions are not discriminatory since they apply to all cases of preventive detention under the ISA without exception.

(17) Article 12 of the Constitution does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there are some differences on the circumstances of the offence that has been committed.

(18) The appropriate punishments for each class is a question for the legislature to decide, and not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in the circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with art 12(1) of the Constitution.

(19) The abolition of the right of appeal to the Privy Council does not in any way deny the applicant the right to

A equal protection of the law as provided under art 12(1), as all ISA detainees, present or future, and all parties to pending habeas corpus actions in the High Court are equally denied the right of appeal to the Privy Council.

B (20) The Reid Constitutional Commission Report 1957 cannot be regarded as a basis for the interpretation of the legislative powers conferred by art 149 or any law passed pursuant to it.

[Editorial Note: The applicant has appealed to the Court of Appeal vide Civil Appeal No 30 of 1989.]

Cases referred to

- 1 *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69 (refd)
- C 2 *Lee Mau Seng v Minister of Home Affairs, Singapore & Anor* [1971] 2 MLJ 137 (folld)
- 3 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (distsd)
- 4 *Endell Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113 (refd)
- 5 *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (refd)
- D 6 *Ong Ah Chuan v PP* [1981] AC 648 (folld)
- 7 *Minerva Mills Ltd v Union of India* [1981] 1 SCR 206 (not folld)
- 8 *P Sambamurthy v State of Andhra Pradesh* AIR 1987 SC 663 (not folld)
- 9 *Hinds v The Queen* [1977] AC 195 (refd)
- E 10 *Kesavananda v State of Kerala* AIR 1973 SC 1461 (not folld)
- 11 *Government of the State of Kelantan v Government of the Federation of Malaya and Anor* [1963] MLJ 355 (folld)
- 12 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (folld)
- 13 *Phang Chin Hock v PP* [1980] 1 MLJ 70 (refd)
- F 14 *The Zamora* [1916] 2 AC 77 (folld)
- 15 *Minister for Home Affairs & Anor v Karpal Singh* [1988] 3 MLJ 29 (refd)
- 16 *R v Halliday* [1917] AC 260 (refd)
- 17 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (refd)
- 18 *Yeap Hock Seng v Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279 (refd)
- G 19 *PP v Kong Teng Khen* [1976] 2 MLJ 166 (folld)
- 20 *Theresa Lim Chin Chin v Inspector-General of Police* [1988] 1 MLJ 293 (refd)
- 21 *Duport Steels Ltd and Ors v Sirs and Ors* [1980] 1 All ER 529 (refd)

Legislation referred to

- H Constitution of the Republic of Singapore arts 4, 5(1), (2), 9, 11(1), 12(1), (2), 13, 14, 21, 58(1), 93, 149
- Constitution of the Republic of Singapore (Amendment) Act (No 1 of 1989) s 3
- Internal Security Act (Cap 143, 1985 Ed) ss 8(1), 8A, 8B, 8C, 8D, 10
- Internal Security (Amendment) Act (No 2 of 1989)
- Rules of the Supreme Court 1970 O 54
- I Act A354 of 1976 [Mal]
- Emergency (Essential Powers) Act 1979 [Mal] ss 2(4), 9(3), 12
- Federal Constitution [Mal] arts 5(4), 8, 121, 159
- Restricted Residence Enactment [Mal]

Anthony Lester QC with Patrick Seong and Roslina Baba (Ms) for the applicant.

S Tiwari with Joyce Huen (Ms) and Soh Tze Bian for the respondents.

Cur Adv Vult

Chua J: This is an application by Teo Soh Lung (applicant) for a writ of habeas corpus. The applicant is presently detained at Whitley Road Centre, Onraet Road, Singapore, under a detention order served on her on 8 December 1988.

The applicant was first arrested by officers from the Internal Security Department ('ISD') on 21 May 1987. A detention order for a period of one year with effect from 20 June 1987 was made against her on 19 June 1987 pursuant to s 8(1) of the Internal Security Act, Cap 143 ('ISA'). On 26 September 1987 the detention order against the applicant was suspended subject to the execution of a bond and compliance with certain conditions. On 19 April 1988, the Minister, in exercise of his powers under s 10 of the ISA, revoked the suspension direction dated 26 September 1988 with immediate effect from 19 April 1988. The applicant was again detained at the Whitley Road Centre.

On 22 April 1988, the applicant applied for a writ of habeas corpus. The application was heard by the High Court by Lai Kew Chai J and the application was dismissed on 2 August 1988. The applicant appealed to the Court of Appeal (Civil Appeal No 81 of 1988) [see *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals*¹] and on 8 December 1988, her appeal was allowed on the ground that there was no sufficient evidence of the President's satisfaction as required under s 8(1) of the ISA. An order for her immediate release was made. In the appeal, legal issues were raised on the applicant's behalf. Although the Court of Appeal did not adjudicate upon them, it did, however, deal with them. A summary of its conclusions is set out in the judgment. The conclusion which is relevant to the present proceedings is conclusion 6 [at p 90] where the Court of Appeal stated that:

the President's satisfaction under s 8 of the ISA and the Minister's satisfaction under s 10 of the ISA are both reviewable by a court of law as:

- (a) the subjective test adopted in *Karam Singh* and its progeny can no longer be supported and the objective test is applicable upon a judicial review of the exercise of these discretions;

The order for release was served on the officer-in-charge of the Whitley Road Centre at about 4.40 pm the same day. At about 4.45 pm the same day, the applicant was placed in a car and driven out of the gate of the Whitley Road Centre for a few hundred metres. The applicant was then served with a new detention order dated 8 December 1988, for the period 8 December 1988 to 19 June 1989 and arrested.

Certain events which occurred in Parliament in January 1989 are relevant to the submissions of counsel for the applicant. On 16 January 1989, the government introduced two measures in Parliament: The Constitution of the Republic of Singapore (Amendment) Act 1989

A (No 1 of 1989) which was passed by Parliament on 25 January 1989, and came into operation on 27 January 1989; the Internal Security (Amendment) Act 1989 (No 2 of 1989) which was passed by Parliament on 25 January 1989, and came into operation on 30 January 1989.

B By the Act No 1 of 1989, art 149 of the Constitution of the Republic of Singapore ('the Constitution') was amended. The article as amended provides as follows (the amendment is in italics):

- (1) If an Act recites that action has been taken or threatened by any substantial body of persons, whether ... inside or outside Singapore –
- (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;
- (b) to excite disaffection against the President or the Government;
- (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;
- (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
- (e) which is prejudicial to the security of Singapore.

any provision of that law designed to stop or prevent that action or any amendment to that Law or any provision in any law enacted under the provisions of clause (3) is valid notwithstanding that it is inconsistent with Articles 9, 11, 12, 13 or 14, or would, apart from this Article, be outside the legislative power of Parliament.

(2) A law containing such a recital as is mentioned in clause (1) shall, if not sooner repealed, cease to have effect if a resolution is passed by Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under the Article.

(3) *If, in respect of any proceedings whether instituted before or after the commencement of this clause, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, such question shall be determined in accordance with the provisions of any ... law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate any law enacted pursuant to this clause.*

By the Act No 2 of 1989, the Internal Security Act H (Cap 143) was amended by the addition of four new provisions: Sections 8A, 8B, 8C and 8D as follows:

8A In this Part, 'judicial review' includes proceedings instituted by way of...

- (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
- (b) an application for a declaration or an injunction;
- (c) any writ of habeas corpus; and
- (d) any other suit or action relating to or arising out of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any provision of this Act.

8B(1) Subject to the provisions of subsection (2), the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the Presi-

dent or the Minister by the provisions of this Act shall be the same as was applicable and declared in Singapore on the 13th day of July 1971; and no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply.

(2) There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question ... relating to compliance with any procedural requirement of this Act governing such act or decision.

8C Notwithstanding the provisions of any other written law, no appeal shall lie in the Judicial Committee of Her Britannic Majesty's Privy Council in any proceedings instituted by way of judicial review in respect of any decision made or act done under this Act or in respect of any question of interpretation of the provisions of Part XII of the Constitution or any law made thereunder.

8D Sections 8A, 8B and 8C shall apply to any proceedings instituted by way of judicial review of any decision made or act done under the provisions of this Act, whether such proceedings have been instituted before or after the commencement of the Internal Security (Amendment) Act 1989.

The purpose of s 8B(1) of the ISA is to re-affirm the law as laid down in *Lee Mau Seng v Minister of Home Affairs, Singapore & Anor*,² the decision having been given on 13 July 1971. In *Lee Mau Seng*² the applicant applied for a writ of habeas corpus. He was arrested without a warrant by a police officer and an order for detention was made by the Minister for Home Affairs under s 8(1) of the Internal Security Act directing that he be forthwith detained for a period of two years. The decision of the High Court was that the sufficiency and relevancy of the consideration upon which the executive detained the applicant under s 8(1) of the ISA were matters for the subjective satisfaction of 'the President acting in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet' (the 'subjective test'). The court also held that 'mala fides' or bad faith is not a justiciable issue in the context of the ISA.

Mr Lester says that but for the amendments made to art 149 of the Constitution and to the ISA, the applicant would undoubtedly have been entitled to rely on the Court of Appeal's judgment in her favour on the relevant issues of law both when challenging the new detention order of 8 December 1988, and when seeking damages for tortious conduct in relation to her previous detention in the action instituted before the commencement of the Internal Security (Amendment) Act 1989. Two main questions were raised by Mr Lester:

- (1) do the purported amendments have the effect of depriving Teo Soh Lung of the right to effective judicial review of the legality, the rationality, and the constitutionality ... of her detention purported under the ISA?;
- (2) if so, are they valid amendments, or are they contrary to the supreme law of the Constitution and therefore void?

The first question

Mr Lester's submission is that the amendments do not have the effect of depriving the applicant of the right to

A judicial review of the legality, the rationality, and the constitutionality of her detention under the ISA. Mr Lester argues that nothing in art 149 as amended of itself prevents the courts from reviewing the legality, rationality and constitutionality of the new or the prior detention orders. Section 8A defines 'judicial review' in very broad terms in an attempt to destroy the applicant's pending legal proceedings. It expressly covers not only the present application for a writ of habeas corpus, but also the application for judicial review and the action for damages instituted before the commencement of the Internal Security (Amendment) Act 1989.

C Mr Lester submits that ss 8B(1) and 8B(2) do not cover the present application. The applicant does not seek judicial review of any act done or decision made by the President or the Minister in pursuance of any power conferred upon the President or the Minister by the provisions of the ISA or under the provisions of the ISA. D She seeks the judicial review of acts and decisions of the President or the Minister which purport to have been done or purport to have been made in pursuance of the powers conferred by s 8 of the ISA or under the provisions of the ISA but which were in fact done for improper purposes and in a manner which was illegal, irrational and unconstitutional and beyond the scope of the powers conferred by the ISA and hence null and void. E

Mr Lester cites the House of Lords case of *Anisminic Ltd v Foreign Compensation Commission*³ as the leading case on the principles to be applied on the construction of statutory provisions ousting or limiting the ordinary jurisdiction of the court. The Privy Council, says Mr Lester, has also stated its approval of the principle in *Anisminic*³ in the case of *Endell Thomas v Attorney-General of Trinidad and Tobago*.⁴ Mr Lester submits that the principle of strict construction applies to the new ss 8A and 8B of the ISA. G

Mr Lester says that s 8B(1) is plain and unambiguous. It expressly refers to any decision made or act done 'in pursuance of any power conferred upon the President or the Minister by the provisions of the Act'. Mr Lester argues that it has no application to a decision made or act done otherwise than in pursuance of any such power. Accordingly, subject to s 8B(2), the court is not prevented from applying the legal principles enunciated by the Court of Appeal in its judgment of 8 December 1988, in adjudicating upon the applicant's challenge to the purported decisions and acts of the President and the Minister, outside the proper scope of their statutory powers. H I

Mr Lester says as regards s 8B(2), it refers to 'any act or decision made by the President or the Minister under the provisions of the Act.' He argues that an 'act or decision' refers to a real act or decision and does not include an apparent or purported act or decision, which is a nullity. Accordingly, the ouster clause in s 8B(2) does

not bar the present application. Mr Lester states that the nature of the applicant's case is that, in purporting to make their decisions and to act, the Minister and the President (acting on the advice of the Cabinet: art 21 of the Constitution) have misconstrued s 8 and s 10 of the ISA, have acted in bad faith and for improper purposes, have had regard to irrelevancies, have disregarded relevant considerations and have acted outside the scope of the ISA. He submits nothing in s 8B(2) prevents the court from adjudicating upon the merits of that claim, in the light of all the evidence which is before the court. So much for the arguments and submissions of Mr Lester.

The Court of Appeal in Civil Appeal No 81 of 1988 [*Chng Suan Tze v The Minister of Home Affairs and other appeals*¹] allowed the applicant's appeal solely on the technical ground that the respondents had not adduced admissible evidence of the President's satisfaction. What constituted admissible evidence under s 8 of the ISA is the only ratio decidendi of the case. All other matters mentioned in the court's conclusions are obiter dicta. Those observations of the Court of Appeal on the applicability of the objective test, evidence of national security, *Karam Singh's* case,⁵ review on the grounds of illegality, irrationality and procedural impropriety, and burden of proof, etc cannot apply to the present proceedings in the light of the new ss 8B(1) and 8B(2) of the ISA. Section 8B(1) clearly lays down that the subjective test applies to the exercise of the powers pursuant to ss 8 and 10 of the ISA and s 8B(2) provides that there is to be judicial review only in regard to any question relating to compliance with any procedural requirement of the ISA governing such act or decision.

The burden of proof is on the applicant to prove that her detention is unlawful as the respondents have produced a valid detention order and evidence of the subjective satisfaction of the President acting on the advice of the Cabinet.

As I have said the new s 8B(1) reaffirms the law governing judicial review as laid down in *Lee Mau Seng*,² that the subjective test applies in determining the proper exercise of the discretionary power of the President or the Minister under the ISA. In the light of this new provision any principles inconsistent with the law laid down in *Lee Mau Seng*² cannot apply to the present case. The respondents cannot be required to adduce any other evidence apart from the grounds and allegations of fact to prove to the court that their decision was in fact based on national security considerations. Any such requirement would be contrary to s 8B(2).

The applicant's challenge on the grounds of mala fides and improper purpose cannot be raised in the present proceedings. In *Lee Mau Seng*² the court held that 'mala fides' or bad faith is not a justiciable issue in the context of the ISA and the power conferred by the Act on the President who had to act in accordance with the

A advice of the Cabinet to direct the issue of the order of detention if he is satisfied under the Act that it is necessary to do so.

Mr Lester has urged that the proper legal principles to be applied in the present case are those enunciated in *Anisminic*.³ I am of the view that the principles in *Anisminic*³ are not applicable to the present case. *Anisminic*³ at most decided that there was a presumption that the court was not precluded from inquiry whether a decision of a tribunal was acting outside its jurisdiction. In that case their Lordships recognized that whether any nullity or lack of jurisdiction had arisen depended on the interpretatory power conferred upon the tribunal. The question therefore was whether the tribunal in making its decision had stayed within the mandate given to it by Parliament. It is clear that in the view of the Privy Council in *Endell Thomas v AG of Trinidad and Tobago*⁴ that a situation would only fall outside the jurisdiction of an authority on the *Anisminic* principles only if the authority did something obviously outside the powers conferred on it.

In *Anisminic*³ it was clear from the legislation in question that Parliament had not conferred on the Commission the power to define persons qualified to recover compensation. Parliament had exhaustively laid down the criteria defining persons qualified to recover compensation. On a proper interpretation of the legislation, a person was qualified to recover compensation on the sole condition that he was a British national. The Commission was not empowered to require the further qualification that the assignee had to be a British national as well. The scheme of the legislation merely enabled the Commission to administer compensation within fixed and determined limits which the legislature itself had laid down. The preclusive clause could not, therefore, have any application except to a determination made within the limits of the definitions, conditions and prescribed matters fixed by Parliament.

The scheme under the ISA is clearly different. Parliament has left to the Cabinet and the President acting in accordance with the advice of the Cabinet to determine whether it is necessary in the interests of national security to detain a person. Parliament has not sought in the ISA to define activities which are prejudicial to national security. It is for the executive to determine as a matter of policy and judgment whether certain activities are prejudicial to national security.

I In this case the executive has acted upon its jurisdiction conferred by Parliament. The Minister of Home Affairs in his affidavit has stated that the Cabinet and the President acting in accordance with the advice of the Cabinet were satisfied that the applicant had acted in a manner prejudicial to the security of Singapore by being involved in a Marxist conspiracy to subvert the existing social order with a view to establishing a socialist state.

To allow the court to investigate into the good faith or otherwise of the President who was to act in accordance with the advice of the Cabinet in arriving at his satisfaction would be inconsistent with the scheme intended by Parliament. Section 11 of the ISA provides that a person detained under s 8 may make representations against his detention order. Section 12(2) provides that upon considering the recommendation of the Advisory Board, the President may give the Minister such direction, if any, as he thinks fit regarding the order made by the Minister and every decision of the President therein would be final and shall not be called in question in any court. The answer to Mr Lester's first question is, therefore, 'Yes'.

The second question

The submission of Mr Lester is that the purported amendments to art 149 of the Constitution are contrary to the supreme law of the Constitution and are not valid amendments. On the assumption that the purported amendments to art 149 are valid, he submits the purported amendments to s 8 of the ISA do not come within the legislative powers conferred by art 149 as amended and are ultra vires art 149 as amended and therefore void.

Mr Lester's argument is this. The ISA was made pursuant to art 149 rather than art 58(1) of the Constitution. As regards the Internal Security (Amendment) Act 1989, it purports to have been made pursuant to art 149(3) of the Constitution. Article 149 is therefore the empowering provision. Article 149, both in its original and in its amended form, severely derogates from the fundamental rights and freedom of the individual, guaranteed by Part IV of the Constitution. As such, it should be given a strict interpretation against the state and a generous interpretation in favour of the individual. (See *Ong Ah Chuan v PP*.⁶)

The unamended art 149(1) provides that, if an Act recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore, of the kind specified in art 149(1)(a) to (e) 'any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with art 9, 13 or 14, or would, apart from this Article, be outside the legislative power of Parliament.' Mr Lester contends that the unamended art 149(1) thus validates only a particular provision of a law, and it does so only if that provision is 'designed to stop or prevent' subversive action of the kind specified in (a) to (e) of art 149(1).

The amendment to art 149(1) adds 'any amendment to that law or any provision in any law enacted under the provisions of clause (3)'. Each of these two further limbs is governed, says Mr Lester, by the overriding requirement that the amendment or the provision in question are themselves 'designed to stop or prevent' subversive

- A action of the kind specified in art 149(1)(a) to (e). Mr Lester argues that if the amendment or provision, purporting to be made under the new art 149(3) is not designed to stop or prevent subversive action of the kind specified in art 149(1), it is ultra vires. Mr Lester contends that art 149(3) and the amendments to the ISA should not be construed literally but purposively, having regard to the character and origin of the Constitution, to the structure of the Constitution as a whole, to the context in which art 149 is placed and to the need for a generous interpretation in favour of individual freedom, then art 149(3) cannot possibly be given an arbitrary and irrational interpretation.

- Mr Lester says that it is significant that art 149 is included in Part XII of the Constitution, which is entitled 'Special Powers Against Subversion and Emergency Powers'. The powers which it confers are special and to be used only against subversion. The legislative powers conferred by art 149 are in derogation from fundamental rights and freedoms and as such, they should be construed strictly, allowing no greater derogation than is necessary in the interests of national security. Mr Lester submits that the proper approach as regards the interpretation of the legislative powers conferred by art 149 as amended is reflected in the Report of the Federation of Malaya Constitutional Commission 1957, chaired by Lord Reid, which observed:

- ... but Parliament should not be entitled to authorize infringements of such a character that they cannot properly be regarded as designed to deal with the particular situation. It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the court.

- Mr Lester submits that the legislative powers conferred by art 149 as amended does not authorize legislation which sanctions or facilitates the misuse of the powers conferred by the ISA in a manner or for purposes other than to stop or prevent subversive action of the type prescribed by art 149(1). Mr Lester contends that the aims and the purported effects of the amendments to art 149 of the Constitution and to s 8 of the ISA by the addition of ss 8A, 8B, 8C and 8D are:

- (a) to deprive the applicant of the fruits of her victory on the central legal issues in the Court of Appeal, and to do so retrospectively;
- (b) to destroy all the applicant's pending legal proceedings;
- (c) to authorize the applicant's arbitrary detention;
- (d) to retrospectively deny to the applicant the right to appeal to the Privy Council in these proceedings and in any other pending or future proceedings in respect of any of her periods of detention, thereby to discriminate against her by denying her the right to the equal protection of the law, as provided for in art 12(1) of the Constitution;
- (e) to deny to the applicant not only the protection of the rule of law interpreted and applied by an independent

and impartial judiciary, but also the protection of the specially entrenched fundamental liberties enshrined in art 11(1) and art 12(1) of the Constitution; and

- (f) to violate the separation of powers, guaranteed by the Constitution, as between the legislature, the executive and the judiciary, by usurping the power of the independent judiciary for the impartial determination on the justiciable question whether the executive's decision in any particular case was in fact based upon national security considerations.

Mr Lester submits that these amendments fall outside the legislative powers conferred by art 149 as amended, because they are not designed to stop or prevent subversive action of the kind specified in art 149(1), Mr Lester says they purport to immunize from judicial review acts done and decisions made in bad faith, for improper purposes, irrelevant to the stopping or prevention of subversive action. They purport retrospectively to deprive the applicant of the benefit of the Court of Appeal's decision and of the right of appeal to the Privy Council in respect of her pending as well as any future claims. None of them is designed to stop or prevent subversive action. Each of them is designed to authorize arbitrary acts and decisions outside the rule of law. They are therefore ultra vires and void and do not debar the applicant's claim to habeas corpus. Mr Lester submits that the purported amendments to the Constitution are invalid. Mr Lester's arguments are as follows.

Article 4 of the Constitution provides that 'This Constitution is the supreme law of the Republic of Singapore and any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution, to the extent of the inconsistency be void.' Article 5(1) of the Constitution provides that 'Subject to this Article and Article 8, the provisions of this Constitution may be amended by a law enacted by the legislature.' Article 5(2) of the Constitution provides that 'A Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof.'

The applicant does not dispute that in the present case the requirements of art 5(2) have been satisfied. The applicant, however, does dispute that s 3 of the Constitution of the Republic of Singapore (Amendment) Act 1989 read on its own and read with the Internal Security (Amendment) Act 1989, constitutes a 'law' within the meaning of art 5(1). Mr Lester contends that the legislature is empowered only to enact laws. Mr Lester submits that the amendments which have been made are not the enactment of a 'law' within the meaning of art 5(1). He argues that the amendments amount to a direction that the applicant's pending proceedings (the civil claim for damages in tort, the stayed application for judicial review and the present application for habeas corpus) must fail

A and should be discharged. They are a direct disposal of her proceedings by the legislature itself, and are therefore judicial acts and not the enactment of a 'law' within the meaning of art 5(1).

Mr Lester further submits that Parliament's powers to amend the Constitution are limited not only by the express provisions of art 5 but also by implied limitations upon the amending power which are derived from the basic structure of the Constitution itself. Mr Lester says that the Privy Council has not had occasion to decide this fundamental question about implied limitations upon the power to amend a written constitution so as to damage the basic features of the Constitution or so as to destroy its basic structure. Mr Lester, however, relies on two decisions of the Supreme Court of India: *Minerva Mills Ltd v Union of India*⁷ and *P Sambamurthy v State of Andhra Pradesh*.⁸

Mr Lester contends that in *Ong Ah Chuan*⁶ the Privy Council made it clear that the Singapore Constitution is founded on the Westminster model and incorporates the rule of law, including the fundamental rules of natural justice. Mr Lester also contends that in *Hinds v The Queen*⁹ the Privy Council made it clear that the Singapore Constitution embodies the 'basic principle of separation of powers' including preserving the exclusive functions of the courts in exercising judicial power. Mr Lester submits that Parliament is not empowered to amend the Constitution in a manner which has violated the basic structure of the Constitution and exceeded its legislative powers by:

- F (i) usurping judicial power exclusively vested in the judiciary, in breach of the separation of powers;
- (ii) depriving the applicant of the protection of the law, including the rule of law, as regards the matters of which she has complained in the pending and present proceedings;
- G (iii) without recourse to judicial review under the Constitution or at common law (except for failure to comply with purely procedural requirements);
- (iv) authorizing the applicant to be punished by being detained without trial, even though she has committed no wrongdoing and even though her detention and punishment are for improper purposes;
- H (v) acting retrospectively; and
- (vi) enacting what is in essence a conclusive and retrospective legislative judgment that the executive is entitled, whatever the true facts of the applicant's case, to detain her on grounds which may be improper and irrelevant or punitive and discriminatory, without liability in private law or in public law.

So much for the arguments and submissions of Mr Lester made on behalf of the applicant.

In *Minerva Mills Ltd*⁷ the Supreme Court of India agreed with the majority view in *Kesavananda v State of*

Kerala¹⁰ that every provision of the Indian Constitution could be amended by Parliament provided in the result the basic foundation and structure of the Constitution remained the same ('Kesavananda doctrine'). Ray J (one of the dissenting judges) in *Kesavananda*¹⁰ said that since constitutional law is the source of all legal validity and is itself always valid, 'an amendment being the Constitution itself can never be invalid. An amendment is made if the procedure is complied with. Once the procedure is complied with it is a part of the Constitution' (at para 788). Ray J also said (at para 1078):

... The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential ... features. Parliament in exercise of constituent power can amend any provision of this Constitution.

If the framers of the Singapore Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. But art 5 of the Constitution does not put any limitation on the amending power.

If the courts have the power to impose limitations on the legislature's power of constitutional amendments, they would be usurping Parliament's legislative function contrary to art 58 of the Constitution. Article 5 expressly provides that any provisions of the Constitution can be amended by a two-thirds majority in Parliament. In the words of Ray J in *Kesavananda*¹⁰ (at para 932):

Fundamental or basic principles can be changed. There can be radical change in the Constitution like introducing a Presidential system of government for a cabinet system or a unitary system for a federal system. But such amendment would in its way bring all consequential changes for the smooth working of the new system.

At para 959:

... those who frame the Constitution also know that new and unforeseen problems may emerge, that problems once considered important may lose their importance because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of government to another. ... The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and well-being of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution.

Lord Diplock in *Hinds*⁹ envisaged that even fundamental provisions of a constitution on the Westminster model could be amended by following the proper procedure provided by the Constitution. He said (at p 214):

... a constitution on the Westminster model represents the final step in the attainment of full independence by the

A peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. (Emphasis added)

B The Malaysian courts have declined to follow the *Kesavananda* doctrine (see *Government of the State of Kelantan v Government of the Federation of Malaya & Anor*;¹¹ *Loh Kooi Choon v Government of Malaysia*;¹² *Phang Chin Hock v PP*¹³). In *Loh Kooi Choon*,¹² a constitutional amendment was considered which had the effect of abridging a fundamental right. The amendment was effected by Malaysian Act A354 of 1976, which provided in effect that the right of an arrested person to be produced before a magistrate within 24 hours (under art 5(4) of the Malaysian Constitution) should not apply to arrests or detentions under the Restricted Residence Enactment. Raja Azlan Shah FJ (as he then was) held that any provision of the Constitution could be amended under art 159. He pointed out that art 159 was subject to no proviso making fundamental rights inviolable. Referring to the doctrine of implied restrictions on the power of constitutional amendment, he said (at p 190):

E A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

F As to the question, can an amendment of a clause in the Constitution operate with retrospective effect, he said (at p 190):

G In so far as an Act of Parliament is concerned, the rule of construction is that in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not to be construed retrospectively unless it is clear that such was the intention of Parliament. *If such was the intention that the Act was to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust.* (Emphasis added)

H In *Phang Chin Hock*¹³ the Malaysian Emergency (Essential Powers) Act 1979 was challenged as invalid in that it destroyed the basic structure of the Constitution. The Federal Court in rejecting the *Kesavananda* doctrine, I said (at p 72):

If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, art 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter

their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention.

The Federal Court expressed agreement with the view of Raja Azlan Shah FJ in *Loh Kooi Choon*¹² where he said at pp 188-189:

Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' – see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544.

The Federal Court also said (at p 74):

The fear of abuse of Parliament's power to amend the Constitution in any way they think fit cannot be an argument against the existence of such power: *Bank of Toronto v Lambe* (1887) 12 App Cas 575, and *Attorney-General for Ontario v Attorney-General for Canada* [1912] AC 571, for actual abuse of power can always be struck down: *Attorney-General for Alberta v Attorney-General for Canada* [1939] AC 117.

In *Phang Chin Hock*¹³ three provisions of the Malaysian Emergency (Essential Powers) Act 1979 ss 2(4), 9(3) and 12, were considered by the Federal Court. It was argued that they destroyed the basic structure of the Constitution and were therefore void. As regards s 2(4), it was submitted that it is too wide and empowers the Yang di-Pertuan Agong to make essential regulations to make laws inconsistent with the whole of the Federal Constitution and any State Constitution and may be misused to destroy the basic structure of the Constitution. As regards s 9(3), it was submitted that it encroached on the judicial power of the Federation which has been vested in the judiciary and amounts to a Bill of Attainder or a Bill of Pains and Penalties. As regards s 12, it was submitted that it destroys the basic structure of the Constitution by ousting the jurisdiction of the courts by preventing it from questioning the validity of the Proclamation of Emergency issued by His Majesty.

Notwithstanding the radical nature of those provisions, the Federal Court held:

As regards the objection to s 2(4) – we have already stated our view that art 159 means what it says, that Parliament may amend the Constitution in any way they think fit provided that they comply with all the conditions prescribed, and that fear of abuse of power is no argument for denying its existence.

As regards s 12, it only precludes the courts from questioning the validity of proclamations issued under Acts or Ordinances based on Part XI of the Constitution, not that of proclamations of emergency issued under the Constitution.

As regards s 9(3), Mr Sidhu submitted that it has the effect of finding the accused guilty by legislative act, thus encroaching on the judicial power of the courts enshrined in art 121 which provides:

A '... the judicial power of Federation shall be vested in (the courts).'

In our judgment Parliament has not by s 12 encroached on the judicial power of the courts and the section is perfectly valid.

The Federal Court held that the Emergency (Essential Powers) Act 1979 was constitutional.

There were two other issues raised in *Phang Chin Hock*.¹³ First, does Parliament have power to make constitutional amendments that are inconsistent with the Constitution? Second, if Parliament has power to make constitutional amendments that are inconsistent with the Constitution, do they have power to make amendments that destroy the basic structure of the Constitution? Having considered these questions the Federal Court summarized their answers thus:

... first, Parliament has power to make constitutional amendments that are inconsistent with the Constitution. Secondly, Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself and it is unnecessary for us to say whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution.

I am of the view that the *Kesavananda* doctrine is not applicable to our Constitution. Considering the differences in the making of the Indian and our Constitution, it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution. In any case, in my judgment, none of the amendments complained of has destroyed the basic structure of the Constitution. Mr Lester in the course of his argument enumerated the manner in which, in his submission, Parliament has violated the basic structure of the Constitution. However, I am of the view, that they do not violate the basic structure of the Constitution.

The subjective test in ISA cases had for many years served the national security interests of Singapore to deal with subversion. The amendments are to reaffirm the law which the courts had followed since *Lee Mau Seng*² until the decision of the Court of Appeal in December 1988. The amendments touching on arts 11, 12 and 93 are only intended to ensure that the clear intent of Parliament is not disregarded. There is nothing in the amendments which is unrelated to the requirements of national security. A reaffirmation of principles laid down by the courts cannot be said to be objectionable as usurping judicial power or being contrary to the rule of law. There is no abrogation of judicial power. It is erroneous to contend that the rule of law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgment in applications for judicial review or other actions. Parliament has done no more than to enact the

rule of law relating to the law applicable to judicial review. The legislation does not direct the court to enter a particular judgment or dismiss a particular case. The court is left to deal with the case on the basis of the amendments. Legislation designed against subversion must necessarily include provisions to ensure the effectiveness of preventive detention. The amendments are intended to do just that.

The question whether a particular provision in any law enacted pursuant to art 149 is designed to deal with a particular situation is non-justiciable. Preventive detention relates to national security which is the responsibility of the executive. It is clear from the Constitution and the ISA, especially after the recent amendments, that the intention of Parliament is that whether preventive detention is necessary in a particular case is left to the subjective satisfaction of the executive. In *The Zamora*¹⁴ Lord Parker said (at p 107):

Those who are responsible for the national security must be the sole judges of what the national security requires. It would obviously be undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

The above passage was cited with approval by the Supreme Court of Malaysia in *Minister for Home Affairs, Malaysia & Anor v Karpal Singh*.¹⁵ In *R v Halliday*,¹⁶ the appellant, a naturalized British subject of German birth was interned under reg 14B made under the Defence of the Realm Consolidation Act 1914. It was contended on behalf of the appellant that reg 14B was not authorized by the Act and was ultra vires. The regulations were to be for preventive purposes. Lord Finlay LC said (at p 269):

It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law.

In *Council of Civil Service Unions v Minister for the Civil Service (GCHQ case)*,¹⁷ Lord Diplock said (at p 952):

... National security is the responsibility of the executive government; what action is needed to protect its interest is, as the cases cited by my noble and learned friend Lord Roskill establish and common sense itself dictates, a matter on which those on whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.

By virtue of the amended art 149(1), the new ss 8A, 8B, 8C and 8D of the ISA are valid notwithstanding that they are inconsistent with arts 9, 11, 12, 13 or 14 of the Constitution or would, apart from art 149, be outside the legislative power of Parliament. In any case, art 11(1) protects a person against retrospective criminal laws and repeated trials. The ISA is not a criminal law nor does the question of repeated trials arise in the present case. Preventive detention is clearly not a penal or criminal matter

A (see *Yeap Hock Seng v Minister for Home Affairs, Malaysia*¹⁸).

In view of the new art 149(3), nothing in art 93 is to invalidate the provisions of the Internal Security (Amendment) Act 1989. Since Parliament has decided that the subjective test, which has applied to ISA cases all along until the Court of Appeal judgment of December 1988, should continue to apply to such cases, Parliament is entitled, in the interest of national security, to decide that the subjective test should apply to all cases, past, present and future. It cannot be said that the decision of Parliament is unreasonable in the circumstances. There is nothing discriminatory about the changes; nor do the changes amount to a usurpation of judicial power.

In *Loh Kooi Choon v Government of Malaysia*¹² the appellant had been arrested and detained under a warrant issued under the provisions of the Restricted Residence Enactment. He had not been produced before a magistrate within 24 hours of his arrest. He claimed damages but it was held that no action could be brought against the police officer as he was acting in compliance with a warrant issued by a competent authority. He appealed but before the appeal was heard the Federal Constitution was amended by Act A354/76 which provided in effect that art 5(4) of the Constitution shall not apply to the arrest or detention of any person under the existing law relating to restricted residence and that this amendment shall have effect from Merdeka Day. It was argued that the amendment was unconstitutional. It was held by the Federal Court that:

F (1) Parliament can alter the entrenched provisions of art 5(4) to remove the provision relating to the production before a magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in art 159(3) is complied with. When that is done it becomes an integral part of the Constitution; it is the supreme law, and accordingly it cannot be said to be at variance with itself.

G (2) If Parliament retrospectively affects vested rights or pending proceedings, then it would be the duty of an appellate court to apply the law prevailing on the date of appeal before it. Subject to the constitutional limitation of art 7 of the Constitution, to wit, protection against retrospective criminal laws and repeated trials, Parliament would be within the ambit of its competence if it deems fit to legislate retrospectively.

H I The amended art 149(1) also renders the Internal Security (Amendment) Act 1989 valid notwithstanding that it is inconsistent with art 12. In any case the new ss 8A, 8B, 8C and 8D, and s 10 of the ISA are not inconsistent with art 12. The provisions are not discriminatory since they apply to all cases of preventive detention under the ISA without exception. The provisions apply to all per-

sons who are under preventive detention to prevent them from doing acts prejudicial to the national security or public interest. In *PP v Kong Teng Khen*¹⁹ Suffian LP said (at p 170):

Article 8 guarantees to all persons equality before the law and its equal protection. Regulations 6, 7, 13, 19, 20 and 21 prescribe rules of procedure and evidence different from those applicable under the Criminal Procedure Code and the Evidence Act and to that extent they are discriminatory, but as between all persons charged with security offences within the meaning of reg 2(1) they are not discriminatory and do not therefore offend against art 8. It would have been different if the regulations provide that some persons charged with security offences are to be subject to one set of rules and others charged with similar offences to another set of rules. The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons for the purpose of legislation', *Kedar Nath v State of West Bengal* AIR 1953 SC 404. (Emphasis added)

In *Ong Ah Chuan*⁶ Lord Diplock said (at p 673):

Equality before the law and equal protection of the law require that like should be compared with like. What art 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.

The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with art 12(1) of the Constitution. (Emphasis added)

Article 8 of the Malaysian Constitution is in pari materia with art 12 of the Singapore Constitution.

The abolition of the right of appeal to the Privy Council does not in any way deny the applicant the right to the equal protection of the law as provided under art 12(1), as all ISA detainees, present or future, and all parties to pending habeas corpus actions in the High Court, are equally denied the right of appeal to the Privy Council. All parties are treated equally before the law. In any event, as I have said, the amended art 149(1) protects the validity of ss 8C and 8D of the ISA against any inconsistency with art 12(1). The decision to proceed under the ISA is within the discretion of the executive.

A All that equality requires is that the executive give unbiased consideration whether to proceed under the ISA or under the ordinary law.

In my view the Reid Constitutional Commission Report 1957 cannot be regarded as a basis for the interpretation of the legislative powers conferred by art 149 or any law passed pursuant to it. See *Theresa Lim Chin Chin v Inspector-General of Police*.²⁰ In my judgment Parliament has the power to amend any provision of the Constitution so long as the special procedure required for amendment is followed. Both the amendments to the Constitution and the Internal Security Act were passed by Parliament by more than the two-thirds majority required. The amendments constituted 'a law' within the meaning of art 5(1).

There is nothing unlawful about the amendments to the Constitution and the ISA. The amendments are of general application and merely restore the law to what it had been all along for many years prior to the decision of the Court of Appeal in December 1988. The abolition of appeals to the Privy Council is a logical consequence of changed circumstances. The amendments are valid and the courts must give effect to them in judicial review proceedings involving ISA cases. As Lord Scarman said in *Duport Steels Ltd v Sirs*²¹ at p 551:

... in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactment. In this field Parliament makes and unmakes the law and the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable.

For these reasons the motion is accordingly dismissed. I will hear counsel on costs on a date to be fixed.

Motion dismissed.

H Solicitors: *Seong Tang & Partners* and *Teo Lai & Lee*.

Reported by *Terence Tan Bian Chye*

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